

MM Dkt. 92-51

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Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, D.C. 20554

MAY - 7 1991

Federal Communications Commission
Office of the Secretary

In the Matter of)
)
Petitions for Declaratory) MMB File No. 910221A
Ruling Regarding Reversionary) MMB File No. 870921A
and Security Interests)

To: The Commission

REPLY COMMENTS OF SANTARELLI, SMITH & CARROCCIO

A. Thomas Carroccio
SANTARELLI, SMITH & CARROCCIO
1155 Connecticut Avenue, N.W.
Suite 900
Washington, D.C. 20036
202/466-6800

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The law firm of Santarelli, Smith & Carroccio ("SS&C") hereby submits its reply comments in the captioned declaratory ruling proceeding.^{1/} For its comments, SS&C states as follows:

1. In its initial comments in this proceeding, SS&C pointed out the need for mechanisms and procedures to be utilized in the perfection of, and execution upon, any security interests as may be allowed by the Commission. At that time, we suggested that such mechanisms and procedures be specified in the Commission's order in this proceeding. The comments of General Electric Capital Corporation ("GECC") also cited the need for such mechanisms and procedures, but suggested the Commission initiate a separate rulemaking proceeding to address these matters. SS&C agrees with GECC that the specification of appropriate mechanisms and

^{1/} Petition for Declaratory Ruling filed by the law firm of Hogan & Hartson, MMB File No. 910221A ("Petition").

procedures should not be allowed to delay the rescission of the Commission policy against security interests. Accordingly, SS&C urges the Commission to address the security interest issue in the most expeditious manner practicable, even if doing so requires the postponement of any consideration of acceptable mechanisms and procedures for the perfection of, and execution upon, security interests.

2. SS&C is aware of only one set of comments filed in opposition to the Petition.^{2/} Those Joint Comments argue, inter alia, that the Communications Act of 1934, as amended ("Act"), prohibit security interests in Commission licenses and authorizations. This reply is directed to certain elements of those arguments not addressed in either the Petition or in SS&C's previously filed comments.

3. The Joint Comments specifically contend that a security interest in a license would allow a secured party to obtain rights beyond the license's terms and conditions (Joint Comments, para. 4). To so argue is to ignore the fact that a grantor of a security interest can never provide the secured party with any right or

^{2/} "Joint Comments on Petition for Declaratory Ruling" filed on behalf of Capstar Communications, Inc., Command Communications, Inc., Jones Eastern Broadcasting, Inc., Legacy Broadcasting, Inc., Liggett Broadcast, Inc. and Sinclair Broadcast Group, Inc. ("Joint Comments").

title superior to that possessed by the grantor.^{3/} A licensee, while having a cognizable right to its license, has neither any right to the frequency covered by the license, nor any right extending beyond the license term. Therefore, a security interest granted by a licensee would not imbue the secured party with a prohibited interest in the covered frequency or with any right beyond the term of the license. In effect, a security interest in a license, being subject to the same restrictions as affect the underlying license, could be no more violative of the Act than the license itself.

4. The Joint Comments allege that a security interest, by providing the secured party with an immediate legal interest in a license, will subvert the Commission's exclusive right under Section 310(d) of the Act to pass upon a person's qualifications prior to the grant of a license to that person. It must be recognized, however, that the interest of the secured party is initially one of a priority claimant, and may only be executed upon in the event of a subsequent default by the grantor. Because any security interest in a license, like the license itself, will be subject to the prior consent requirements of the Act and the Commission's Rules, no action effectuating possession or control of the license may be taken without the prior consent of the Commission. Therefore, compliance with the Commission's procedures

^{3/} For example, a tenant may grant a security interest in its lease, but such security interest does not provide the secured party with any interest in the subject real property beyond that afforded the tenant under the lease.

and the requirements of the Act regarding the assignment of a license would in no way be obviated by the existence of a security interest in that license.

5. The Joint Comments find it objectionable that an existing security interest may hinder a licensee's ability to assign its license to another party. Such a position ignores the purpose of a security interest, i.e., the protection of the secured party against subsequently arising claims, contractual or otherwise, to the security. All a security interest in a license would do is prevent the licensee from contracting to assign its license to another party in derogation of the pre-existing rights of the secured party. Simply by meeting or extinguishing its contractual obligation to the secured party, however, the licensee can free itself of any restraint the security interest may have imposed on its right to assign the license. Accordingly, a security interest in a license would do nothing more than require the licensee to meet its previously agreed upon contractual obligations to the secured party upon whom the licensee conferred the security interest.

6. By raising the specter of a Commission inundated with conflicting contractual claims upon the licenses issued by it, the Joint Comments seek to dissuade the Commission from granting the relief sought by the Petition (Joint Comments, para. 16). At the same time, the Joint Comments predict that allowing security interests in licenses will result in other forums encroaching upon the Commission's authority and discretion to determine the

qualifications of its licensees (Joint Comments, para. 15). These contradictory positions both ignore the fact that the Commission has long deferred to the courts to determine contractual rights involving licenses while reserving to itself the ultimate determination of licensee qualifications.^{4/} There is no suggestion in the Petition, or in any other comments filed in this proceeding, that the Commission take it upon itself to resolve any conflicting contractual claims with regard to security interests. Instead, all parties have assumed that the Commission will continue the current bifurcation of functions whereby the courts remain the appropriate forum for the resolution of legal claims and the Commission continues to fully exercise its exclusive right and obligation to finally and definitively determine the qualifications of any court designated assignee to be a Commission licensee. The Commission is not now, and would not become as a result of any security interest, obligated to blindly accept as a licensee any person found by the courts to be legally entitled to obtain a license. Over the past several decades, the present procedures for resolving such issues have proven to be adequate and to serve the public interest. There would be no need to change or abandon such procedures in order to accommodate security interests in licenses.

^{4/} Circumstances under which the Commission has deferred to a court's determination of contractual or other legal right to a license include, but have not been limited to, the probate of decedents' estates; appointments of receivers and trustees; actions for specific performance; and the resolution of conflicting contractual claims.

CONCLUSION

The factors set forth in the Petition and in the other comments filed in this proceeding amply demonstrate that security interests in Commission licenses are statutorily permissible and would serve the public interest, notwithstanding the assertions of the Joint Comments to the contrary.

Respectfully submitted,

SANTARELLI, SMITH & CARROCCIO

By: 

A. Thomas Carroccio
SANTARELLI, SMITH & CARROCCIO
1155 Connecticut Avenue, N.W.
Suite 900
Washington, D.C. 20036
202/466-6800

May 7, 1991

CERTIFICATE OF SERVICE

I, Michele A. Depasse, a secretary with the law firm of Santarelli, Smith & Carroccio, do hereby certify that on this 7th day of May, 1991, a true and correct copy of the foregoing foregoing "Reply Comments of Santarelli, Smith & Carroccio" were delivered by U.S. mail, first-class, postage-prepaid to the following individuals:

Roy J. Stewart, Esq.
Chief, Mass Media Bureau
Federal Communications
Commission
1919 M Street, N.W.
Room 314
Washington, D.C. 20554

Marvin J. Diamond, Esq.
Gardner F. Gillespie, Esq.
Susan Wing, Esq.
Hogan & Harton
555 - 13th Street, N.W.
Washington, D.C. 20004

Victor E. Ferrall, Jr., Esq.
John T. Scott, III, Esq.
Crowell & Moring
1001 Pennsylvania Ave., N.W.
Washington, D.C. 20004-2505

Eric L. Bernthal, Esq.
Gary M. Epstein, Esq.
Bruce E. Rosenblum, Esq.
Martin F. Petraitis, Esq.
Latham & Watkins
1001 Pennsylvania Ave., N.W.
Washington, D.C. 20004-2505

Tom W. Davidson, Esq.
Margaret L. Tobey, Esq.
Janet S. Crossen, Esq.
Sidley & Austin
1722 Eye Street, N.W.
Washington, D.C. 20006

Diane S. Killory, Esq.
Ellen G. Block, Esq.
Susan H. Crandall, Esq.
Morrison & Foerster
2000 Pennsylvania Ave., N.W.
Washington, D.C. 20006

John Beisner, Esq.
F. Amanda DeBusk, Esq.
O'Melveny & Myers
555 - 13th St., N.W.
Suite 500 West
Washington, D.C. 20004-1109

Martin R. Leader, Esq.
Scott R. Flick, Esq.
Gregory L. Masters, Esq.
Fisher, Wayland, Cooper
and Leader
1255 - 23rd St., N.W.
Suite 800
Washington, D.C. 20037

Philip J. Smith, Esq.
Ropes & Gray
One International Place
Boston, MA 02110-2624

Paul J. Sinderbrand, Esq.
Keck, Mahin & Cate
1201 New York Avenue, N.W.
Washington, D.C. 20005-3919

Thomas J. Casey, Esq.
Skadden, Arps, Slate,
Meagher & Flom
1440 New York Ave., N.W.
Washington, D.C. 20005

Paul W. Robinson, Esq.
Stephen C. Simpson, Esq.
Broadcast Trustee
Management, Inc.
1233 - 20th Street, N.W.
Suite 205
Washington, D.C. 20036

Irwin L. Gubman, Esq.
Senior Vice President and
Associate General Counsel
Bank of America
Box 37000
San Francisco, CA 94137

Stephen P. Mumblow
Managing Director
The Chase Manhattan Bank,
N.A.
1 Chase Plaza
New York, NY 10081

James E. Scott, Esq.
Associate General Counsel
and Assistant Secretary
Security Pacific Corp.
P.O. Box 60468
Terminal Annex
Los Angeles, CA 90060

Gregg E. Johnson
Vice President
American Security Bank
1501 Pennsylvania Ave., N.W.
Washington, D.C. 20013

Julie Y. Kim
Assistant Vice President
Den norske Bank
600 Fifth Avenue
New York, NY 10020

Edmund P. Rogers, III, Esq.
Senior Vice President and
Resident Counsel
J. P. Morgan & Co., Inc.
60 Wall Street
New York, NY 10260

Andrew I. Douglass, Esq.
Executive Vice President and
General Counsel
Heller Financial, Inc.
200 North LaSalle Street
Chicago, IL 60601

Jacqueline A. Hurlbutt
Senior Vice President
First National Bank of
Chicago
Chicago, IL 60670

Peter G. Smith
Vice President-Director
Canadian Imperial Bank of
Commerce
425 Lexington Avenue
New York, NY 10017


Michele A. Depasse